UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Marathon Petroleum Logistics Services, LLC

Employer

and **Case 14-RD-210506**

Stiles Burson

Petitioner

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC

Union

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACUTRING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC'S OPPOSITION TO MARATHON PETROLEUM LOGISTICS SERVICES, LLC'S REQUEST FOR REVIEW

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I. Introduction

This case is about a decertification election at Marathon Petroleum Logistics, LLC ("Marathon" or "Employer"). The Employer challenged Robert "Rocky" Goodman's ballot because he is on long-term disability leave. The Board has developed and repeatedly upheld a practical, bright-line test to determine whether an employee on medical leave is eligible to vote: is there affirmative evidence that the employee has resigned or been discharged? If the answer is no to either of these questions, the employee can vote in union elections. *Home Care Network, Inc.*, 347 NLRB 859, 859 (2006) (citing *Red Arrow Freight Lines*, 278 NLRB 965 (1986)). The Hearing Officer and the Acting Regional Director applied this *Red Arrow* test and correctly found that Goodman was eligible to vote.

The Employer argues that the Hearing Officer and the Acting Regional Director erred for two reasons. First, the Employer argues that Goodman is ineligible to vote under the *Red Arrow* test because Marathon effectively discharged or laid off Goodman. But the Employer never communicated to Goodman that his employment was allegedly terminated. To the contrary, the Employer continued to provide him with health insurance benefits, included Goodman as an "employee" on various documents, and told him that he had two years to return to work from the date he began his leave. Moreover, the collective-bargaining agreement protected Goodman from "neutral discharge" for a two-year period and outlined specific procedures for the Employer to follow in the event of a layoff. It is undisputed that the Employer did not follow this contractually-mandated process.

Second, the Employer argues that the Board should overturn *Red Arrow*. Both unions and employers have advocated for the *Red Arrow* standard. The Board has repeatedly upheld the test.

Every Circuit Court that has reviewed the issue has upheld the Board. Still, the Employer seeks to overturn fifty years of precedent, arguing that the Board should: 1) first determine whether an employee has a temporary or long-term medical condition; and 2) only apply the *Red Arrow* test to employees who are "expected to recover." The Employer also argues that the Board should apply the reasonable expectancy of recall test, used in layoff situations, to evaluate the eligibility of employees with longer-term illnesses. The Employer offers no guidance as to how the Board would determine if an employee has a temporary or longer-term condition. Further, the Board and reviewing courts have long recognized that applying the recall standard to medical situations would introduce unnecessary uncertainty to the litigation process, require unions and employers to produce expert testimony, Hearing Officers to evaluate complex, specialized medical evidence, and all parties to engage in extensive litigation. Under *Red Arrow*, in contrast, both unions and employers are on notice that employees on medical leave are eligible to vote and can negotiate language to exclude these employees.

The Employer has not provided a compelling reason to review the Acting Regional Director's decision and implement a new test. The Board should deny the Employer's Request for Review.

II. Factual Background

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW" or "Union") has represented Marathon's bargaining-unit employees, including Goodman, since early 2016. On August 4, 2016, Goodman injured his hip at work. Five days later, Goodman's personal physician, Dr. Hoelscher, released him to full duty with no restrictions. (Tr. at 33, lines 17-25).

Instead of allowing Goodman to return to work, the Employer placed him on paid-time off. (Tr. at 34, lines 1-7). The Employer cited concern over Goodman's two previous injuries: an injury to his left knee in 2013 and an injury to his right knee in 2014. (Tr. at 34, lines 3-5; Er. Ex. 2; Er. Ex. 9; Er. Ex. 11). In both circumstances, physicians commissioned by the Employer examined Goodman, eventually releasing him to work with no restrictions. (Er. Ex. 9, p. 8; Er. Ex. 2[1]).

After Goodman's hip injury, the Employer commissioned another independent medical assessment. Athletico Physical Therapy conducted a capacity exam on September 14, 2016, based on the description of job duties in the Employer's Functional Job Site Analysis. (Er. Ex. 10; Er. Ex. 3). A few weeks later, Dr. Gross, a physician commissioned by the Employer, reviewed Athletico's report and examined Goodman. Dr. Gross concluded that Goodman could not safely perform the essential functions of his job. (Er. Ex. 11). Dr. Gross never stated that Goodman had reached maximum medical improvement. (*Id.*).

No one has evaluated whether Goodman can return to work since Dr. Gross submitted his report on September 29, 2016. (*Id.*). At the hearing, the Employer admitted that it has not revisited the issue since late September 2016, over a year before the election. (TR. at 106, lines 20-25; 107, line 1).

In October 2016, the Employer placed Goodman on medical leave based on Dr. Gross's evaluation. (Tr. at 34, lines 3-5). The Employer explained to Goodman that he could apply for long-term disability leave after 26 weeks of medical leave. (Tr. at 25, line 7). Additionally, Isaac Perkins, the Employer's Advanced Human Resources Consultant, told Goodman that under the

[1] The Employer submitted a timeline into evidence as Employer Exhibit 2. This timeline states that on October 22, 2015, Dr. Gross, an independent physician commissioned by the Employer, sent a letter recommending Goodman's return to full duty. The Employer did not enter this letter into evidence.

collective-bargaining agreement, Goodman "would be considered an employee" for two years from his last day of work. (Tr. at 180, lines 23-25; 181, lines 1-11).

Perkins was referring to Article XII, Section 11(c) of the parties' collective-bargaining agreement. That section protects an employee's seniority for up to two years while he or she is off work "for any reason." (Union Ex. 4). Only after this two-year period may the Employer "neutrally discharge" the employee. (*Id.*). Goodman's two-year period does not end until August 10, 2018.

Goodman applied for the Employer's long-term disability leave plan ("Plan") on January 25, 2017. (Er. Ex. 13). In his application, Goodman stated that, "I can't return to work due to results of a functional capacity evaluation and a physicians [sic] medical evaluation." (*Id.*). The Employer's Plan requires participating employees to have "potential for vocational rehabilitation," "to take steps to expedite their recovery," and to "follow . . . the recommended course of treatment" in order to receive benefits. (*Id.* at 5, 9). In April 2017, Goodman was approved for benefits. (Er. Ex. 15).

The Employer's Plan is administered through a third party; under the Plan regulations, this administrator, rather than the Employer, pays enrollees directly. (Er. Ex. 14, at 3, 4, 15). Participating employees receive 60% of their monthly base pay, which excludes bonus payments. (*Id.* at 6). The Plan also requires participants to apply for Social Security disability benefits. (*Id.* at 9; Tr. at 26, lines 21-25; 27, line 1; Tr. at 118, lines 7-11). Goodman complied with Plan requirements and applied for Social Security. (Tr. at 26, lines 21-25; 27, lines 5-7). The Employer has maintained Goodman's health insurance and retirement benefits since his last day of work through the present. (Tr. at 49, lines 1-5; 50, lines 13-15; 51, lines 10-14; Union Ex. 8).

Before going on leave, Goodman maintained two residences. He owned a house in Grand Tower, Illinois and rented an apartment in Wood River, Illinois. He rented the apartment because the Employer has a policy requiring employees to live within a 45-minute drive of the facility. After he went on leave, Goodman decided to stop renting the Wood River apartment because his Plan payments were significantly less than his full salary. (Tr. at 185, lines 20-25; Er. Ex. 14). He notified the Employer that he no longer rented the apartment in Wood River. (Tr. at 43, lines 4-5). Goodman has also informed the Employer that he would like to return to work. (Tr. at 199, lines 5-7). The Employer subsequently listed Goodman's Grand Tower address in a list of current employees provided to the Union. (Union Ex. 2, Tr. at 160, lines 5-25; 161, line 1). Goodman testified that he would immediately rent another apartment in Wood River if he is able to return to work. (Tr. at 185, lines 3-10).

Both the Employer and Goodman took a number of additional steps consistent with Goodman's status as an employee on long-term leave. For example, Goodman voluntarily returned his company cell phone and H2s monitor after he realized that the Employer was incurring additional expense by allowing him to keep the phone number. (Tr. at 186, lines 16-20). In the Employer's Statement of Facts, the Employer claims that Keith Friedmann, Marathon's Operations Supervisor, asked Goodman to return company equipment and collect his personal belongings. Goodman, however, clearly recalled returning the phone and monitor voluntarily while Friedmann had difficulty remembering the details of his interactions with Goodman. (Tr. at 99, lines 17-22; 101, lines 21-25; 102, line 1).

None of the Employer's witnesses could remember whether the Employer had actually deactivated Goodman's security badge. (Tr. at 54, lines 23-25; 55, line 1). Regardless, Friedmann testified that the Employer could easily reactivate Goodman's badge. (Tr. at 101, lines 1-6). And

when Goodman visits the facility, the security guards recognize him and allow him to enter the facility even without his badge. (Tr. at 187, lines 9-16). Goodman no longer has a locker, but Jayson Nohl, Marathon's Manager, testified that Employer could easily provide Goodman with a new locker and nameplate. (Tr. at 208, lines 11-13). And while Goodman's Operations Technician license expired during his leave, he could easily update this qualification. (Tr. at 52, lines 8-10). Goodman testified that his certifications lapsed when he was previously on leave and he easily brought them up to date. (Tr. at 196, lines 18-25; 197, lines 1-6).

It makes sense for an employee on extended leave to stop renting an additional apartment and to return company property. It also makes sense for the Employer to deactivate that employee's badge, use his locker for another purpose, and require the employee to recertify after he returned to work, rather than going through the trouble while on leave. The Employer and the Union made another common-sense decision given Goodman's employment status; they agreed to remove Goodman from the seniority list that the parties use for ensuring the equalization of overtime, filling job vacancies, and recall in the event of a layoff. (Tr. at 99, line 25; 100, lines 1-5). Goodman was on extended leave. Overtime opportunities, job vacancies, and a potential layoff did not apply to him and it therefore made sense to temporarily remove him from this list. No one from the Union or the Employer told Goodman that the parties had removed his name from the list.

In its brief, the Employer mistakenly states that this decision "effectively eliminated any prospect of returning to work" and that Goodman does not retain seniority. (Er. Br. at 4, 9). The Employer misunderstands the testimony and the seniority provision of the CBA. Removing Goodman from the list did not mean that he lost seniority or that he is no longer an employee. The seniority list is only used for the practical purposes described above; it is not an exhaustive

record of everyone in the plant with seniority. (Tr. at 163, lines 15-24). Again, the CBA expressly protects Goodman's seniority for a two-year period while his is off work for any reason, including disability leave. Dave Dowling, USW Staff Representative who negotiated this contract language, testified that Goodman continues to accrue seniority under the CBA, regardless of whether he is on the overtime list or not. (Tr. at 163, lines 19-25). Even if Goodman had stopped accruing seniority, the Employer is still incorrect that Goodman no longer has seniority. At worst, he would return to work with the same seniority that he had when he left.

Goodman was still on leave in late November 2017, when Petitioner Stiles Burson filed for decertification. Two days after Burson filed his petition, the Union requested an updated list of USW-represented employees and their contact information from the Employer. (Union Ex. 1; Tr. at 159, lines 9-24). In response, the Employer attached a spreadsheet including Goodman as a current employee and stating that his "employment status" was "LTD." (Union Ex. 2; Tr. at 160, lines 5-25; 161, line 1). The Employer also listed Goodman's Grand Tower address. (Union Ex. 2).

Several weeks later, the parties signed a Stipulated Election Agreement. (Bd. Ex. 1(b)). This Agreement included employees who were "ill" during the relevant period as eligible voters. The Agreement explicitly excluded the following employees from voting: employees who had quit, employees that the Employer had discharged for cause, and certain employees on strike. The Agreement did not exclude employees on long-term disability or medical leave. (*Id.*).

In accordance with this Agreement, the Employer provided the Regional Director, the Union, and the Petitioner with a list of "all eligible voters." (Union Ex. 6). The Employer included Goodman and described him as an "Employee on LTD [long-term disability leave]." (*Id.*).

Goodman voted in the December 19, 2017 election. The Employer challenged his ballot and the Regional Director ordered that a hearing be held to determine Goodman's eligibility. At the hearing, the Employer testified that it had not discharged Goodman and that Goodman had not resigned. (Tr. at 107, lines 10-13, 14-16; 207, lines 6-8, 15-17). The Employer confirmed that it had not communicated to Goodman that his employment was severed through a discharge or a layoff. (*Id.*). The Employer also testified that Goodman was still enrolled in Marathon's healthcare plan for active employees and had not received a COBRA notice. (Tr. at 49, lines 1-5; 50, lines 13-15; Union Ex. 8). Further, the Employer testified that it had not required Goodman to roll over his company-sponsored 401(k). (Tr. at 51, lines 10-14; lines 13-16; Union Ex. 7).

After considering the evidence and the parties' briefs, the Hearing Officer applied the *Red Arrow* test and found that Goodman was eligible to vote in the election. She rejected the Employer's argument that it had constructively discharged or laid off Goodman. She also found that Goodman was eligible to vote under the reasonable expectation of return test.

The Employer filed multiple exceptions to the Hearing Officer's Report, asking the Acting Regional Director to find that Goodman was a laid-off employee with no reasonable expectation of return. The Acting Regional Director upheld the Hearing Officer. She found that the Hearing Officer correctly applied the "well-established" *Red Arrow* standard. (ARD Decision at 1). She further found that the Employer had not constructively discharged or laid off Goodman because: 1) the Employer never informed Goodman that he had been terminated or laid off; 2) the Employer told Goodman that he had two years to return to work pursuant to the collective-bargaining agreement; 3) the Employer continued to provide health insurance and long-term disability benefits to Goodman and included him on documents as an employee; and 4) the Employer did not follow the layoff procedure outlined in the CBA. (*Id.* at 1-2).

The Employer filed this Request for Review, arguing that the Acting Regional Director's decision was clearly erroneous. The Employer also asks the Board to overturn the neutral and easy-to-administer *Red Arrow* test in favor of a standard requiring the agency to conduct lengthy hearings full of expert testimony and to evaluate specialized medical evidence.

III. Argument

1. Standard of Review

The Board only grants a request for review if there are "compelling reasons" to do so. The Board will only find a "compelling reason" if one or more of the circumstances is met:

1) The Acting Regional Director's Decision raises a substantial question of law or policy due to the absence of or departure from Board precedent;
2) The Acting Regional Director's Decision on a substantial factual issue is clearly erroneous and this error prejudicially affects the rights of either party;
3) The conduct of the hearing or any ruling made in connection with the hearing has resulted in prejudicial error; or
4) Compelling reasons exist to reconsider an important Board rule or policy.

Board's Rules and Regulations, Section 102.67(c).

The Employer requests review under the first, second, and third justifications.

2. The Employer fails to present a compelling reason to review the Acting Regional Director's decision or to overturn the *Red Arrow* standard.

The Employer failed to present a compelling reason for the Board to review the Acting Regional Director's decision. First, the Acting Regional Director considered the following undisputed

facts: the CBA protects Goodman's seniority and prohibits a "neutral discharge" for a two-year period; the Employer told Goodman that he had two years to return to work; the election was held within this two-year period; the Employer never communicated any termination of employment to Goodman; and the Employer included Goodman as an "employee" in various documents, including the decertification voter list. She correctly upheld the Hearing Officer's finding that the Employer had not discharged Goodman and that he had not resigned. Second, there is no reason to revisit the practical, bright-line *Red Arrow* test. At the request of both employers and unions, the Board has already reviewed this standard multiple times and repeatedly declined to overturn it.

i. The Acting Regional Director did not err in finding that Goodman was still an employee because Goodman was contractually protected for a two-year period, the Employer never told Goodman his employment was terminated, and the Employer continued to provide healthcare and retirement benefits.

The Employer argues that the Acting Regional Director erred in three ways. First, the Employer claims that it effectively terminated Goodman and that the Acting Regional Director's finding to the contrary was clearly erroneous. Second, the Employer claims that it laid Goodman off and that the Acting Regional Director's finding to the contrary was clearly erroneous and departed from Board precedent. And third, the Employer claims that the Acting Regional Director departed from Board precedent by "ignoring" the community-of-interest analysis.

First, the Employer argues that it "manifested its intent" to terminate Goodman. According to the Employer, the Hearing Officer, upheld by the Acting Regional Director, incorrectly found that a formal letter or oral communication of termination is required in *Red Arrow* cases. The Employer misstates the Hearing Officer. She never decided that the Employer

had to provide Goodman with a formal communicating terminating his employment. Rather, she cited to the relevant law, stating, "[a]n employee on medical leave is presumed to be an employee unless an affirmative termination of employment has been shown." (Hr. Off. Rep., at 6, *citing Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 606 (3d Cir. 1996)). She found that the Employer did not present sufficient evidence of an affirmative termination, such as an oral or written communication to Goodman.

Even the Employer acknowledges that "a manifestation of the intent to terminate which is clearly communicated to the other party" is necessary for the Board to find a constructive termination. (Er. Br. at 10, *citing Cavert*, 83 F.3d at 607). In the case cited by the Employer, the Third Circuit considered evidence more suggestive of termination than the record in this case. For example, the Cavert employee never contacted his employer after going on leave, his employer's representative instructed him never to contact the employer again, the employer sent the employee a letter terminating his health insurance and the employee did not respond, and the employer removed him from payroll. *Cavert*, 83 F.3d at 607. Still, the Third Circuit upheld the Board in finding no manifestation of intent to terminate. According to the Court, "Cavert cannot merely point to its own subjective intention or understanding that the employment relationship had been terminated to establish an affirmative termination." *Id.* at 607. Instead, an employer must "clearly communicate" its intention to terminate an employee. *Id.* at 607. *See also Grapetree Shores, Inc.*, 356 NLRB 316, 322 (2010) (rejecting employer's argument that employee on medical leave had been terminated when employer never informed employee of her alleged termination); *Cardi Corp.*, 353 NLRB 966, 970 (2009) (finding employee on medical leave eligible to vote because "most significant[ly], the Respondent never orally or in writing terminated [the employee's] employment"); *Mediplex of Connecticut, Inc.*, 319 NLRB 281, 299

(1995) (employee still eligible to vote even though employer intended to terminate her when she returned from disability leave because she had not been formally discharged).

The Employer never clearly communicated to Goodman that his employment had been terminated. In fact, the Employer did exactly the opposite. Perkins told Goodman that he "would be considered an employee" for two years from his last day of work. (Tr. at 180, lines 23-25; 181, lines 1-11). Perkins correctly interpreted the parties' CBA, which protects employees' seniority while they are off work "for any reason" for up to two years. (Union Ex. 4). The Employer can only "neutrally" discharge an employee after this two-year period. (*Id.*). Goodman's last day of work before taking medical leave was August 10, 2016. Therefore, this two-year period does not end until August 10, 2018, well after the December 19, 2017 election. Goodman was contractually protected from any "neutral" discharge until the CBA expired on January 31, 2018, after the election. Dowling agreed that "the company may not discharge Mr. Goodman until he has been off work for two years[.]" (Tr. at 165, lines 2-6).

Further, Employer witnesses Friedmann and Nohl both testified that the Employer had not discharged Goodman. (Tr. at 107, lines 10-13; Tr. at 207, lines 6-8). This testimony is consistent with the Employer's behavior: the Employer continued to refer to Goodman as an "employee" in key documents *after* Burson filed the November 27, 2017 petition. Specifically, the Employer included Goodman as a current employee in response to a November 29, 2017 Union information request. The Employer also included Goodman as "an employee on LTD" on its list of eligible voters. (Union Ex. 6). The Board has found that the inclusion of challenged voters on employee lists rebuts an employer's argument that these individuals are no longer employees. *See Mediplex*, 319 NLRB at 299 (inclusion of employee on disability leave on election voter list rebutted employer's argument that she was no longer an employee); *Pepsi-*

Cola, 315 NLRB 1322, 1323 (1995) (finding employee on disability leave eligible to vote when employer included employee's name on the *Excelsior* list).

The parties' Stipulated Election Agreement also included Goodman as an eligible voter because it specifically included "ill" employees. The Acting Regional Director agreed with the Hearing Officer that "ill" employees who did not work during the eligibility payroll period, like Goodman, were eligible to vote under this agreement. The Employer argues that the Haring Officer "unnecessarily conflates" illness and disability. (Er. Br. 10, n. 3). According to the Employer, "[t]o be clear, an employee who is ill is only temporarily removed from the workforce and placed on short-term sick leave and would thus be eligible to vote." (*Id.*).

The Employer provides no evidence that the parties intended this provision of the Stipulated Election Agreement to exclude individuals on disability leave. Instead, the Employer argues that it did not contest the vote of another employee on short-term sick leave. But the Employer's decision to challenge or not challenge an individual voter has nothing to do with what the *parties* intended when they entered into the agreement. Further, the agreement contains the Board's standard eligibility language. The Board has interpreted this language to include employees on disability leave.

In *Pepsi-Cola*, the Board found that an employee on long-term disability leave was eligible to vote because the parties' Stipulated Election Agreement defined eligible voters "to include employees who did not work during the payroll eligibility period . . . because they were 'ill.' It is undisputed that [the challenged voter] did not work during the payroll period because he was ill and on disability leave." 315 NLRB at 323. Similarly, Goodman did not work during the relevant period because he was ill and on disability leave. In this decision, the Board did not "conflate" illness and disability leave but reasonably interpreted illness as including disability

leave. The parties, including the Employer, should have been on notice that the Board interprets the standard voter eligibility language to include employees on long-term disability leave. If the Employer wanted to exclude Goodman's vote, it could have challenged his eligibility in a pre-election hearing instead of signing the Stipulated Election Agreement. The Employer could also have negotiated language to exclude him.

Despite signing the agreement, referring to Goodman as an employee and telling Goodman that he had the opportunity to return to work under the CBA, the Employer still maintains that it effectively discharged him. The Employer provides no authority that the Board has found a constructive termination in situations similar to the instant case. The Employer cites to two cases, both of which are easily distinguishable. In *Harry Lundstead Designs, Inc.*, the employee was injured on the job but did not take any type of formal medical leave. 270 NLRB 1163, 1164 (1984). Instead, he just never returned to work. The employer submitted a formal termination slip and removed the employee's file from its open files. Under these circumstances, the Board found that the employer did not have to directly communicate with the employee.

And in *NLRB v. Economics Laboratory, Inc.*, the collective-bargaining agreement required the employer to post the positions of employees who had been on disability leave for six months or more. 857 F.2d 931 (3d Cir. 1988). The postings allowed other bargaining-unit members to bid for these jobs. The contract then allowed the employer to permanently replace the employee on long-term disability leave with any successful bidder.

In contrast to the above cases, Goodman took formal disability leave through the Employer's program (at the insistence of the Employer). (Tr. at 34, lines 1-7). Goodman has remained in contact with his co-workers and supervisors and tells management that he wants to return to work. (Tr. at 187, lines 1-4; 199, lines 3-7). The parties' CBA does not allow the

Employer to permanently replace employees on leave, unlike the *Economics Laboratory* contract. Here, the totality of the circumstances establish that the Employer never ended Goodman's employment.

As described above, the Employer acknowledged to Goodman that the CBA provided him with a two-year opportunity to return to work. In addition, the Goodman is still enrolled in the Employer's healthcare plan for active employees and has not received a COBRA notice. (Tr. at 49, lines 1-5; 50, lines 13-15; Union Ex. 8). The Board has recognized that an employer's maintenance of employee healthcare benefits is the "most important" indicator that an employee on disability leave maintains his or her active status and is eligible to vote in union elections. *See Pepsi-Cola*, 315 NLRB at 1322 (finding that employee on long-term disability leave was eligible to vote and healthcare was "most important benefit still received"). Further, the Employer acknowledged that a discharge or resignation would constitute a qualifying event for the purposes of COBRA. (Tr. at 50, lines 9-20). Similarly, the Employer has never required Goodman to roll over his company-sponsored 401(k). (Tr. at 51, lines 10-14; Union Ex. 7). Again, the Employer acknowledged that it would require an employee who resigned or was discharged to roll over a retirement account. (Tr. at 51, lines 3-14).

Despite maintaining Goodman's healthcare and retirement benefits, the Employer argues that it "repeatedly manifested its intent" to discharge Goodman. (Er. Br. at 10). The Employer emphasizes that it no longer pays Goodman directly, it stopped matching his 401(k) contributions, he stopped earning bonuses and vacation, and he receives Social Security benefits. These changes, however, are required by the Employer's own disability Plan. This Plan is only available to Marathon employees. Goodman could not receive a check, retirement matches, bonuses, and vacation directly from the Employer and simultaneously remain enrolled in the

Plan. And in *Cavert*, the case cited by the Employer, the Third Circuit upheld the Board in finding that an employee was eligible to vote after his employer removed him from payroll. Again, the *Cavert* court emphasized that the employer failed to clearly communicate that it intended to terminate his employment.

Moreover, the Employer's Plan requires employees to take steps to expedite recovery and to comply with recommended treatment. The Plan prohibits employees with no hope of "vocational rehabilitation" from participating. (Er. Ex. 14). Therefore, by not paying Goodman directly and ceasing retirement matches and bonus and vacation payments, the Employer complied with its own Plan, a Plan that also encouraged Goodman to take steps to return to work.

This Plan also required Goodman to apply for Social Security benefits. (*Id.*). At the hearing, the Employer acknowledged that employees had to apply for government benefits in order to remain enrolled in the Plan. (Tr. at 26, lines 21-25; 27, line 1; 118, lines 7-11). As explained above, this Plan also requires Goodman to take steps to return to work. Therefore, Goodman must do both to continue receiving Plan-sponsored payments. Further, the Board has found that employees receiving Social Security benefits are eligible to vote in union elections. *Pepsi-Cola*, 315 NLRB at 324; *Atlanta Daires Co-op*, 283 NLRB 327, 327 (1987).

The Employer also points to Goodman's removal from the seniority list. Again, the Employer misunderstands the purpose of this list. This list is used to ensure the equalization of overtime, fill job vacancies, and recall in the event of a layoff. Goodman was on extended leave and none of these situations applied to him. The CBA's language expressly protected his seniority and Dowling testified that he would file a grievance on Goodman's behalf if the Employer argued that he had lost his seniority. (Tr. at 163, lines 19-25). Further, the Board has

specifically found that employees on medical leave who were removed from seniority lists were still eligible to vote in union elections. *See Grapetree Shores*, 356 NLRB at 322 (employee on medical leave who stopped accruing seniority eligible to vote because "[a]n individual without seniority rights may still be an employee"). And no one informed Goodman about the seniority list. Therefore, the removal of his name is far from the "clear communication" necessary to effectively terminate him.

Finally, the Employer argues that Goodman "manifested his intent" to terminate his own employment by ending his rental of the apartment in Wood River. (Er. Br. at 11). It is undisputed that Goodman clearly stated to his supervisors and testified at the hearing that he wanted to return to work. (Tr. at 179, lines 13-14; 180, lines 15-22). Goodman also testified that he would immediately comply with the policy if he is able to return and would have no trouble finding a new apartment. (Tr. at 185, lines 3-10). Therefore, Goodman's common-sense decision to save money while on leave does not signal that "he did not intend to, and indeed was unable to, ever resume his employment." (Er. Br. at 12).

Moreover, the Employer testified that it was aware that Goodman's permanent residence was in Grand Tower before he went on leave. (Tr. at 96, lines 14-25; 97, lines 1-10). And approximately two weeks before Burson filed the petition, the Employer provided a list of employees to the Union. This list included Goodman as an employee and listed his Grand Tower residence. (Union Ex. 1). If the Employer sincerely believed that Goodman's alleged violation of its policy constituted a separation of employment, it had plenty of opportunities to terminate Goodman before and after the petition was filed.

In short, the totality of the circumstances establish that the Employer had not discharged Goodman and that he had not resigned. The supposed contrary evidence is all consistent with the

behavior of an employee on disability leave. Therefore, Goodman was eligible to vote under the *Red Arrow* analysis.

Second, the Employer argues that the Acting Regional Director's factual findings are erroneous and that she departed from Board precedent because Goodman is actually a laid off employee with no reasonable expectation of recall. The Employer's argument is confusing; the Employer appears to use the reasonable expectancy of return test (the standard for determining whether employees on layoff can vote in elections) to address the threshold question of whether Goodman was effectively a laid-off employee.

The Employer is mistaken. The Board does not assess an employee's reasonable expectation of returning to work to determine whether or not that employee is in layoff status. When there is a collective-bargaining agreement in place, the contract controls an employer's ability to lay off employees. *See Joseph Chevrolet, Inc.*, 343 NLRB 7, 19 (2004) (the collective-bargaining agreement determines layoff procedures). The CBA that was in effect between the parties specifically outlined a process for layoffs. Under Article XII, Section 6, the Employer must provide the Union with 60 days prior written notice before implementing a layoff. (Union Ex. 4). The Employer must also meet with the Union to discuss the layoff and potential benefits for laid-off employees. (*Id.*). It is undisputed that the Employer did not follow this procedure and never communicated to Goodman that he was allegedly laid off. (Tr. at 172, lines 4-13).

The Employer relies on two cases to support its argument that an employee's expectation of recall (specifically the absence of available work) proves that an employee is effectively laid off. Both of these cases consider the eligibility of voters in newly organized units with no collective-bargaining agreement in place. *Waterman Steamship Corp.*, 78 NLRB 21 (1948); *Advance Waste Systems, Inc.*, 306 NLRB 1020 (1992). Unlike here, the employers in those cases

had no contractual obligations to follow when implementing a layoff. Further, in *Advance Waste Systems*, the employee in question was a per diem employee. 306 NLRB at 1026. The employer called this employee in for work on an as-needed basis. *Id.* This situation is completely differed than Goodman's: Goodman is a salaried employee who followed the procedures to take formal disability leave.

Further, the Board specifically stated that the analysis in *Advance Waste Systems* does not apply to individuals on medical leave: "To the extent that *Advance Waste* is ambiguous and can be construed as applying a 'reasonable expectation of employment' test to sick leave cases, we disavow such a construction and adhere to the *Red Arrow* test in sick leave cases." *Thorn Americas, Inc.*, 314 NLRB 943 (1994). The Employer claims that *Thorn Americas* still "upheld the analysis for determining the eligibility of a laid-off employee." (Er. Br. at 14, n. 4). The only analysis *Thorn Americas* upheld, however, was the *Red Arrow* test.

Therefore, there is no "test" that the Hearing Officer and Acting Regional Director failed to apply. The Employer claims that they relied on Goodman's subjective desire to return to work in finding that he was not a laid-off employee. The Employer misunderstands their analysis. The Hearing Officer and Acting Regional Director cite to Goodman's subjective desires to rebut the Employer's earlier argument that Goodman effectively resigned when he stopped renting his Wood River apartment. Still, the Employer is correct that an employee's intentions do not determine whether an employee is in layoff. The Employer ignores, however, that the *contract* establishes an employee's status. The only relevant question is whether or not the Employer followed the lay-off procedure in the CBA.

It is undisputed that the Employer did not follow the contractual layoff procedure. Still, the Employer argues that Goodman was in layoff status and had no reasonable expectation to

return to work because: 1) the Employer had no available work; and 2) his medical condition prevented him from ever returning. According to the Employer, both the Hearing Officer and the Acting Regional Director ignored "crucial, undisputed facts" in rejecting this argument. (Er. Br. at 13.

The facts are actually very much in dispute. The Employer never established that it would not have work for Goodman if he is able to return. The Employer relies on a past decline in headcount and the Employer's decision not to backfill Goodman's position. Yet these facts demonstrate nothing about the Employer's *future* needs. Friedmann, who has the authority to hire, testified that the Employer's needs are unpredictable:

> Q. You said you don't have a need for another Operations Tech right now. For how long do you think it is fair for you to assume that you will not need another Operations Technician?
> A. That has everything to do with I think the economics of the market and how things ebb and flow . . . I don't know how to answer that question because it is a day to day thing. You know, these things arise just as the market goes up and down.
>
> (Tr. at 97, lines 1-16).

Friedmann also testified that resignations and terminations could have an unpredictable effect on the Employer's labor needs. (Tr. at 98, lines 12-16). Therefore, Friedmann rebutted the Employer's argument that it has no work for Goodman if he is able to return to Marathon.

Goodman also had a reasonable expectation to return to work because of the contractual protections of his seniority status and against discharge. Given the language in the CBA, Goodman could reasonably expect that the Employer would allow him to return to work until the two-year period expired. Dowling also testified that the Union would file a grievance on Goodman's behalf if the Employer claimed it had no available work. (Tr. at 165, lines 23-25; Tr. at 166, lines 1-3). Dowling explained that Goodman has the right to a position based on the

seniority language of the CBA. (*Id.*). Therefore, the Union could potentially win a grievance and ensure Goodman a job.

The Employer also claimed that Goodman has no reasonable expectation of returning to work because of "robust, undisputed record of medical reports." (Er. Br. at 23). Again, this medical evidence is in dispute. Because medical evidence is irrelevant to the *Red Arrow* analysis, the Union did not introduce any medical information. Therefore, the only record testimony regarding Goodman's medical history comes from one physician, Dr. Dowling[2], employed by Marathon, who never personally examined Goodman. (Tr. at 151, lines 18-23). The Hearing Officer and the Acting Regional Director correctly declined to rely on this evidence.

The record includes the testimony of a single medical expert interpreting medical documents that other physicians prepared. This evidence is confusing and inconsistent. For example, Dr. Dowling testified, "I don't think that his [Goodman's] condition would change, as stated by several of the examining physicians, he had reached MMI [maximum medical improvement]." (Tr. at 143, lines 22-25). But Dr. Dowling was referencing earlier reports assessing Goodman in 2013 and 2015, before the hip injury that caused him to take long-term disability leave. The examining physicians concluded that Goodman had reached maximum medical improvement after these earlier injuries and cleared him to return to full duty. (Er. Ex. 7; Er. Ex. 11). Two physicians examined Goodman after his latest injury and neither of them stated that he had reached maximum medical improvement. Still, Dr. Dowling based his current conclusion that it was "highly unlikely and improbable" that Goodman could return to work on his understanding that Goodman *had* reached MMI. (Tr. at 148, lines 12-17; 25).

More importantly, no physician has evaluated whether Goodman can return to work since late September 2016. (Er. Ex. 11). The Employer admitted that there are no additional reports

[2] No relation to Dave Dowling, the Union's Staff Representative.

and that the Employer has not revisited the issue since that time. While Goodman's personal physician, Dr. Hoelscher evaluated Goodman after the September 2016 report, there is nothing in the record that indicates that he did any kind of assessment as to whether Goodman could perform his essential job functions with or without accommodations. And this evaluation occurred on February 7, 2017, still more than ten months before the election.

The Employer never satisfactorily explained why Goodman could not return to work with accommodations, even if he does have physical limitations. The gist of the Employer's concern is that Goodman might trip, especially while walking up and down stairs. (Tr. at 131, lines 5-13). The Employer's own Functional Job Analysis, however, states that climbing stairs constitutes only 3% of Goodman's job. (Er. Ex. 3; Tr. at 95, lines 3-10; Tr. at 131, lines 5-13). In contrast, sitting constitutes 37.5% of the job and is the only activity classified as "frequent." (Er. Ex. 3). Since the most dangerous activity is such a miniscule part of the job, the Employer never explained why it could not accommodate Goodman.

Finally, the Employer argues that the Acting Regional Director erred in departing from Board precedent. Specifically, the Employer claims that both the Hearing Officer and the Acting Regional Director concluded that the community-of-interest analysis is irrelevant to decertification cases. The Employer misunderstands their argument. They did not argue that the community-of-interest analysis is irrelevant to all decertification cases. Rather, that analysis is inapplicable to *this* case. The Board does not apply the community-of-interest test in cases where the Stipulated Election Agreement is unambiguous. *See Kim/Lou, Inc.*, 337 NLRB 191 (2001) (well settled that the Board only applies community-of-interest principles if stipulated election agreement remains ambiguous after considering extrinsic evidence); *McFarling Foods, Inc.*, 336 NLRB 1140, 1140 (2001) (Board only applies community-of-interest test when parties' intent is

unclear and stipulated election agreement is ambiguous). Here, the Employer stated that it "does not contest the appropriateness of this unit." (Er. Br. at 25). Rather, the Employer contests the eligibility of an individual voter on disability leave. *Red Arrow* provides the analysis to resolve that issue.

ii. The Employer's proposed test would introduce unnecessary uncertainty into the litigation process and require the Board to conduct lengthy hearings and to evaluate expert witness testimony and extensive medical evidence.

The Employer also asks the Board to overturn 50 years of precedent and revisit the *Red Arrow* test, which it has already considered and upheld numerous times. Specifically, the Employer seeks to replace the *Red Arrow* test with a burdensome two-step analysis. First, the Employer wants the Board to determine whether an employee has a temporary or longer-term ailment. The Employer provides no guidance as to how the Board would distinguish between employees' medical conditions. This lack of guidance is unsurprising; attempting to categorize ailments based on potential duration is extremely difficult. If an employee's cancer is in remission, is he or she in the first or second category? If an employee has a permanent condition and is usually able to work but experiences periodic and unpredictable flare ups, in which category does this employee fall? Migraines, multiple sclerosis, and schizophrenia are just three examples of permanent conditions that resist classification.

Even if the Board could assess whether an employee's illness is temporary or permanent, the Employer then wants the Board to apply the reasonable expectation of recall standard, the analysis the Board uses in layoff cases, to determine whether employees with long-term ailments are eligible to vote. The Board has considered this identical argument multiple times, at the request of both unions and employers. *See, e.g. Home Care Network*, 347 NLRB at 859

(employer requested review); *Pepsi-Cola*, 315 NLRB at 1323 (union requested review); *Thorn Americas*, 314 NLRB at 943 (employer requested review); *Red Arrow*, 278 NLRB at 965 (union requested review). The Board has repeatedly declined to overturn the objective, practical *Red Arrow* standard. Every Circuit Court to consider the issue has upheld the Board. *See NLRB v. Grapetree Shores, Inc.*, 451 Fed.Appx. 143, 144 (3d Cir. 2011) (unpublished) (internal citations omitted) ("the Board's *Red Arrow* presumption is a reasonable, bright-line rule"); *St. James Community Hospital v. NLRB*, 121 F.3d 717, 717 (9th Cir. 1997) (unpublished) (panel unanimously upheld *Red Arrow* test without need for oral argument); 83 F.3d at 606 (upholding *Red Arrow* because of the Board's concern that reasonable expectancy test would require the agency to evaluate medical evidence).

The Board and the Circuit Courts have repeatedly upheld the *Red Arrow* test for good reasons. The standard provides a practical, bright-line rule, ensuring that non-medical professionals do not evaluate complex medical evidence full of shorthand and terms of art. The test is also predictable. If either party wishes to exclude a voter on medical leave, it has the opportunity to negotiate an election agreement that prevents the employee from voting. Unions and employers are on notice and can act accordingly; this bright-line test is preferable to the uncertainty of prolonged litigation. Further, a reasonable expectancy of recall test would require unions and employers to engage paid medical experts and prepare for long, complex hearings. The Board would also have to expend significant resources in conducting these lengthy hearings. Finally, there is no reason to require lengthy, complex hearings because the *Red Arrow* test is objective, favoring neither unions nor employers. Rather, whichever party the standard happens to disadvantage in a particular case petitions for review. The Board has denied both unions' and employers' attempts to overturn the test.

In *Home Care Network*, the Board explained why:

> As the Board and courts have reiterated, the *Red Arrow* test avoids unnecessary litigation and endless investigation into states of mind or of future prospects. Abandoning this predictable, bright-line rule in favor of reasonable expectancy of recall could require the Board to evaluate medical evidence, potentially opening a new avenue of litigation, possibly involving expert paid testimony, which is beyond the traditional expertise of the agency and inimical to the efficient and expeditious resolution of questions concerning representation . . . We find no persuasive reason to abandon the *Red Arrow* test, the origins of which date back more than 50 years.

347 NLRB at 859 (internal citations and quotations omitted). *See also Supervalu, Inc.*, 328 NLRB 52, 52 (1999) ("[t]he Board, with court approval, has uniformly reject the [reasonable expectation of recall] test").

Nothing in this case raises an issue that the Board has not already considered. As in all the other cases, an employee on medical leave voted in a union election and the party disadvantaged by that vote tries to exclude his ballot. Further, the Hearing Officer found that Goodman was eligible under the test proposed by the Employer. As explained in more detail above, Goodman has a reasonable expectancy of return because: 1) the CBA preserved his seniority rights and protected him from neutral discharge for two years; 2) the Employer told Goodman that he had two years to return to work; 3) the Employer never proved that Goodman was unable to return to work with or without accommodation; 4) the Employer testified that its future labor needs are impossible to predict and that it may have available work in the future; and 5) the Union would file a grievance based on Goodman's seniority if the Employer claimed that it had no available work. (Tr. at 97, lines 1-16). Under the circumstances of this particular case, Goodman is eligible to vote under either standard.

IV. Conclusion

Goodman is an employee on disability leave who was eligible to vote under decades of Board precedent. The Acting Regional Director considered the following undisputed facts: the CBA protects Goodman's seniority for two years and prohibits "neutral discharge" within that period, the Employer told Goodman that he had two years to return to work, the Employer never communicated any type of termination of employment to Goodman, the Employer continued to provide healthcare and retirement benefits to Goodman, and the Employer included Goodman as an "employee" on various documents, including the voter list for the election. The Acting Regional Director correctly concluded that that Goodman is still a Marathon employee. The Acting Regional Director also correctly declined the Employer's attempt to overturn the well-established, objective, and practical *Red Arrow*, recognizing that the Employer's proposed test would introduce uncertainty and lengthy, complex hearings into the litigation process. The Board should do the same.

Respectfully submitted,

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/s/Antonia Domingo

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing on the following parties by electronic mail on March 23, 2018:

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